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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 36

HARICE LEROY CARTER,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS,

Respondent

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS

REPLY BRIEF FOR PETITIONER

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INDEX

Subject Index

	Page
Correction of Respondent's Restatement of the Case	1
Argument:	
I. Reply to Respondent's contention that "the common law record does not sustain the contention that Petitioner was denied the right of counsel or any other Federal Constitutional right	2
II. Respondent's Brief does not attempt to meet Petitioner's argument and the controlling principles and cases cited	5
Conclusion	6

Citations

Cases:

Adams v. *United States*, 317 U. S. 269	4
Canizio v. *New York*, 326 U. S. 666	4
Powell v. *Alabama*, 287 U. S. 45, 71	4
Rice v. *Olson*, 324 U. S. 786, 789	4
Tompkins v. *Missouri*, 323 U. S. 485, 488-9	5
People v. *Motuzas*, 352 Ill. 340, 185 N. E. 614	5

Statutes:

Fourteenth Amendment to United States Constitution	6
Ill. Rev. Stat. 1927, chap. 38, par. 754 (Petitioner's Brief, p. 26, Note 3)	3

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Correction of Respondent's Restatement of the Case

The respondent's Restatement of the Case requires correction on two points:

1. Respondent states that the petitioner has failed to make clear the distinction between the common law record and the other documents contained within the transcript of record on this appeal. In fact, these distinctions have been made abundantly clear by a careful documentation and specific references to the source of all of the facts stated in

the petitioner's brief. The facts outlined at the outset of petitioner's "Statement of the Case" are stated to have been taken from the "Petition for Writ of Error, R. 41-42." Again on pages 9 and 10 of Petitioner's Brief clear and appropriate references have been made to the Information that was certified to the penitentiary officials, and to the fact that "• • • The transcript was not certified by the trial judge and the State, and no Bill of Exceptions was filed."

2. On page 5 of Respondent's Brief reference is made to the entry of the judgment order of the trial Court on June 29, 1928. This is recited in such a way as to imply that petitioner was represented in open Court by an attorney on that day. Actually, the record shows that L. W. Tuesburg, having been appointed to appear only upon a hearing on the question of mitigation or aggravation, was present only on June 18th. The record does not show that Mr. Tuesburg was present on June 29th (Tr. 11). The petitioner made explicit reference to this significant circumstance at page 7 of Petitioner's Brief.

ARGUMENT

I

Reply to Respondent's Contention That "The Common Law Record Does Not Sustain the Contention That Petitioner Was Denied the Right of Counsel or Any Other Federal Constitutional Right".

Respondent first contends that the trial Court had no alternative, upon the petitioner's plea of guilty, but to proceed upon that plea. This is a fundamental error for the Court had two obvious legal alternatives:

1. Refuse to enter the plea, adjourn the hearing, and appoint counsel to aid the petitioner;

2. Interrogate the petitioner and make a determination, *upon the record*, of the Court's finding as to whether the petitioner was sufficiently competent and intelligent to make a valid waiver of his right to counsel, and further whether in fact the petitioner, understandingly, wished to make such a waiver.

Respondent has made five separate assertions, as alleged matters of fact, that the accused rejected a proffer or his right to counsel (Respondent's Brief, pages 10, 12, 13). There is nothing in the record in this case to support these assertions. The petitioner did not reject a proffer of counsel, nor did he decline representation. On the contrary, the petitioner merely failed to take the affirmative steps required by the Illinois Statute, i.e. make a request for appointment of counsel, and make affidavit that he is unable to procure counsel. (Ill. Rev. Stat. 1927 chap. 38, par. 754; Petitioner's Brief, p. 26, note 3.) The petitioner's only action was to plead guilty. A plea of guilty and a failure to claim and demand aid of counsel does not amount to an intelligent and competent waiver of counsel (Brief for Petitioner Point II, pages 23-30).

Lacking any showing upon the record in this case that the petitioner took any affirmative step to waive his right to counsel and lacking anything in the record approaching a determination by the trial Court of a competent and intelligent waiver by petitioner, respondent has sought to expand a simple plea of guilty into a rejection of the aid of counsel and to make it a substitute for an understanding waiver that never was made.

While some affirmative step other than a plea of guilty is required in order to constitute an effective waiver, it is not necessary that an accused in a capital case who is entitled to the aid of counsel, make a request for such

counsel. *Powell* v. *Alabama*, 287 U. S. 45, 71; *Rice* v. *Olson* 324 U. S. 786, 789.

The substance of Respondent's argument rests on only two cases. The first of these, *Adams* v. *United States*, 317 U. S. 269, was not a capital case while this petitioner was indicted and convicted of murder. The petitioner has distinguished the *Adams* case from the case at Bar and quoted appropriate excerpts from the opinion at pages 21, 22, 24 and 27 of Brief for Petitioner. The defendant, McCann, in the *Adams* case, was a man of mature judgment and experience who insisted that he was competent to conduct his own defense. Moreover, McCann pleaded not guilty and defended himself in the course of an extended trial. His decision to waive counsel and a jury trial was made well in advance of the actual trial. Here the petitioner pleaded guilty to murder, without the aid of counsel, on the day that the indictment was handed to him.

Respondent's second case is *Canizio* v. *New York*, 326 U. S. 666. This decision was respondent's sole reliance for opposition to this petitioner's Petition for Certiorari. But it now appears that the respondent concedes that the *Canizio* case does not control the case at Bar (Respondent's Brief, p. 12). As petitioner has stated, and the respondent now admits, the general appearance of counsel for Canizio is in direct contrast to the limited scope of the appointment of Mr. Tuesburg for the petitioner upon the sole question of mitigation or aggravation. In conceding that the appointment of Mr. Tuesburg was so limited as not to satisfy the requirements of Due Process, respondent states (Respondent's Brief, page 12):

> "We concede that, had the accused not explicitly waived his right to counsel before pleading guilty, such an appointment of counsel for purposes so limited would not have satisfied the requirements of Due Process."

Again respondent concedes (Respondent's Brief, p. 13) that the question facing the petitioner in determining his plea was "a delicate one." This understatement does not obscure or relieve the complexities and intricacies of the legal problems that the petitioner faced, unaided by counsel, upon arraignment. The ingredients of the crime of murder, as distinguished from the lesser offenses, are not simple but ones over which skilled judges[1] and practitioners have disagreements. *Tompkins* v. *Missouri*, 323 U. S. 485, 488, 489.

II

Respondent's Brief Does Not Attempt to Meet Petitioner's Argument and the Controlling Principles and Cases Cited.

These omissions from respondent's brief are significant:

1. Respondent does not dispute that a citizen who is charged with a capital crime is entitled to the aid of counsel, *at every step* of the proceedings against him.

2. No challenge is made of the proposition that the aid of counsel is just as essential to due process of law in connection with the plea of an accused as it is in the conduct of a trial.

3. Respondent does not deny that the Court's appointment of Mr. Tuesburg was an admission *on the record* that the petitioner was helpless.

4. No attempt has been made to excuse the failure of the trial Court to determine *upon the record* whether the

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[1] The defendant in *People* v. *Motuzas*, 352 Ill. 340, 185 N. E. 614, waived jury trial of an indictment for murder and was found guilty by a trial judge who heard all of the evidence. Upon review the Illinois Supreme Court reversed the judgment *without remandment*, holding that the defendant was innocent of murder and not guilty of any crime.

accused made an affirmative and understanding waiver of his right to the aid of counsel.

5. Respondent avoids the petitioner's contention that his plea of guilty did not constitute a waiver.

6. Despite respondent's contrary position urged upon and accepted by the Illinois Supreme Court no claim is now made that the petitioner in this capital case was required to request the aid of counsel.

7. Respondent does not deny that every reasonable presumption is indulged by this Court against a purported waiver of fundamental Constitutional rights.

Conclusion

The petitioner re-asserts that he was imprisoned without due process of law and in disregard of his Constitutional right under the Fourteenth Amendment; that he was entitled to the aid of counsel at every step of the proceedings against him; that his ignorance was the cause of his plea of guilty; and that this same ignorance is the barrier to any claim that he made an effective waiver of his Constitutional right.

Respectfully submitted,

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